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No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LILLIAN ARONSON,

Petitioner,

vs.

STATE OF ILLINOIS, JUDGES OF THE ILLINOIS APPELLATE COURT (First Division), MAYER GOLDBERG, THOMAS A. McGLOON and CALVIN C. CAMPBELL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LILLIAN ARONSON
9348 Drake Avenue
Evanston, Illinois 60203
(312) 675-7351
Petitioner Pro Se

26 pp

QUESTIONS PRESENTED

1. Whether claim preclusive effect may be given to a prior state court judgment, thereby barring a subsequent federal action, where entry of the judgment without consideration of the alleged violation of the Due Process Clause itself constitutes the basis of the federal action.

2. Whether the United States Court of Appeals for the Seventh Circuit erred by giving claim preclusive effect to a prior state court judgment where petitioner was not afforded a full or fair opportunity to litigate the central factual issue in state court.

3. Whether there is a split between the United States Courts of Appeals for the Fifth, Seventh and Tenth Circuits in their respective applications of claim preclusion and 28 U.S.C. § 1738 to subsequent actions brought under 42 U.S.C. § 1983 which warrants resolution by this Court.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Lillian Aronson, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 31, 1987.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit, dated: March 31, 1987, appears at pp. 1a-5a of the Appendix ("App.").

The Illinois Appellate Court, First Division, Opinion which is published and was entered on February 2, 1981, is reprinted at App. 6a-16a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1987. An extension of time to petition for certiorari until August 28, 1987 was timely requested and granted by the United States Supreme Court by letter dated June 26, 1987, No. A-947. The jurisdiction of this Court is predicated on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner brought suit against respondents, asking protection of federal court for constitutional right to due process of law that was violated by the State through respondents depriving her of any opportunity to be heard on the controlling facts of her state claim for breach of contract even though stigma to her and liberty interests are at stake.

The Prior Illinois State Court Proceedings

Petitioner sued North Park College in the Circuit Court of Cook County, Illinois *inter alia* for breach of contract based upon her dismissal as a student because of an unfounded adverse report on her mental health by a counseling center sponsored jointly by the school and Swedish Covenant Hospital. At trial the school defended *inter alia* on the ground that the school authorities had acted in good faith on the basis of the report from an independent counseling center. Plaintiff responded that good faith was not a defense to a breach of contract under Illinois law and that in point of fact the counseling center was not independent and the school authorities had not acted in good faith. Both petitioner and the school presented evidence on the issues of good faith and independence. Judge, now Illinois Appellate Justice, Charles E. Freeman, entered judgment in favor of plaintiff on her breach of contract clause, without ruling specifically on either the legal question of whether the school's *bona fide* reliance on the report of an independent counseling center, if proven, would constitute a valid defense or the factual questions of whether the counseling center was independent or the school authorities had acted in good faith.

On appeal, the respondents reversed the judgment of the trial court holding that good faith reliance by the school authorities on an independent counseling agency was a valid defense to the breach of contract claim and that, since the counseling center was jointly sponsored and funded by others and served the community as well as other schools, it was not the apparent agent of the defendant school. Respondents did not address other evidence which had been presented at trial to establish lack of independence between the counseling center and the school. In particular, respondents did not address evidence that

(i) the counseling center had been started by North Park College as a department of the school, (ii) it was identified as a department of the school in the student catalog (R. 118, 155), (iii) it was housed in a school building, (iv) its personnel were paid by school checks (R. 85), (v) it used the school switchboard, (vi) it used the school's letterhead for correspondence generally and for the report on which petitioner was dismissed in particular, and, (vii) it did not obtain any authorization from plaintiff to release information from its medical records to the school. More importantly, respondents did not even purport to consider the question of whether petitioner could produce even more compelling evidence of the counseling center's lack of independence, or the school's lack of good faith in dismissing and refusing to readmit her, notwithstanding favorable reports from other unquestionably independent authorities who clearly identified the unfounded nature of the counseling center's adverse report. The respondents not only reversed the judgment of the trial court, but also refused to remand the case and thereby denied petitioner any opportunity to introduce additional evidence or obtain specific findings on the factual issues of the counseling center's lack of independence and the school authorities lack of good faith.

Subsequent petitions for rehearing to respondents in the Court of Appeals and to the Supreme Court of Illinois were denied. The preparation of such petitions was hampered by the loss of the record in the Illinois Appellate Court. By letter dated December 21, 1986, Mr. Steven Ravid, Administrative Attorney of the Court informed plaintiff that the record had been inadvertently destroyed.*

* The trial transcript has been restored and arrangements are underway to file the restored record with the court.

This action was brought in the United States District Court for the Northern District of Illinois. After dismissal of the initial complaint, leave to amend and make a late payment of the filing fee was denied on the ground that the court lacked jurisdiction to review the final judgment of a state court proceeding even if unconstitutional (*District Court of Columbia Court of Appeals v. Feldman*, 460 U.S. at 482), that no federal claim had been stated (plaintiff seems to say "reasons" were not given by State court which they were) and that plaintiff did not claim the "proceedings were a sham or that the justices invidiously used their offices to deprive petitioner of her rights" but that she only claimed that the Appellate Court committed errors. *Adkins v. Underwood*, 520 F.2d 890 (7th Circuit).

The Court of Appeals affirmed holding that Federal Court lacks jurisdiction to review judgments of the Appellate Court of Illinois (*Feldman*), that her underlying claims failed to state cognizable federal claims, that absent allegations that the state court "proceedings were a sham and that the justices invidiously used their office to deprive plaintiff of her rights," federal court is without jurisdiction; (under § 28 U.S.C. 1257—review . . . may only be had in Supreme Court), and that

> "While appellant has certainly framed her amended complaint in constitutional terms, it is clear, upon closer examination, that she is not genuinely concerned with the vindication of recognized constitutional rights but rather with protecting her damage award . . ."

Plaintiff-petitioner won her lawsuit in a bench trial in January of 1980 in the case entitled *Aronson v. North Park College*, 94 Ill.App.3d 211. On February 2, 1981, the respondents reversed depriving petitioner of her due

process rights under the Fourteenth Amendment by entering a judgment reversing one possible legal basis for the state trial court judgment in her favor, and petitioner attempted to receive a remand as discussed below.

The only issue tried (in a short bench trial) was breach of contract; the invasion of privacy count was relinquished on statute of limitations; the fundamental Constitutional right to due process of law count was not pressed.*

In the Fall of 1966, petitioner became a full time student at North Park College ("college") for her last year and a half having attended the college part time since March, 1966. After enrollment and the start of classes petitioner and other new students were notified that all incoming students had to take a psychological test, known as MMPI (Minnesota Multiphasic Personality Inventory). The test was conceded by the college as given without notice before enrollment and start of classes. (R. 136) It was not standardized and unreliable. The testing was in connection with a program carried on by the college and counseling center in which 5-10% of the tested students were required to report to the Center on the basis of their test results. (R. 50-51) In November of 1966, petitioner took the test and thereafter received notice to report to the Center and reported there. She took no other test and none was submitted into evidence, but she passed a "checklist." (R. 55-56) When petitioner was asked by the Center to return yet a third time and report on further personal matters, at additional cost to herself, she refused. However, on threat of dismissal, she returned

* Unable to afford the expense of a protracted trial and (so far as petitioner knows) the possible exemption of North Park College as a private institution from accountability by a due process hearing.

briefly to see the psychologist, (indicating that she could not return). Thereafter she was notified by letter of her dismissal for "insufficient mental health" and—as she learned during discovery—"paranoid." The Director of Testing at Northwestern Memorial Hospital and co-signer of the Amici Curiae brief on her behalf,* testified that the MMPI was unreliable, that petitioner's MMPI results were within normal. (R. 332)

Testimony of Richard Cox ("Cox"), clinical psychologist of the center revealed he did not remember her, he left no other clinical report than as shown by respondents' opinion (and as in the Amici Curiae brief). Psychiatrist Esau of the counseling center never saw petitioner at all prior to trial (R. 113). The Center was required by the state for funds received to put labels on all persons seen whether or not the diagnostic process had been completed. Confidential information flowed between the college and center ("students were presumed to be utilizing a college service when they were at that Center," psychologist Cox reported in his deposition). Petitioner was not given a hearing by the college. (R. 141) No inquiry or investigation was conducted by the Dean. He sought no information from petitioner's references or sources, or from her doctor (whom she enlisted). He dismissed petitioner on receipt of the opinion of psychologist Cox.

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* Authored by Prof. Karl U. Smith, University of Wisconsin; a witness before the U.S. Senate Subcommittee Hearings: "Psychological Tests and Constitutional Rights: Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, June 1965 and Dr. Jack Arbit, Professor in the Department of Psychiatry and Neurology and Director of Psychological Testing, Northwestern Memorial Hospital, Chicago, IL.

The college produced no documentation, witnesses or testimony as to any unsatisfactory behavior by petitioner or to substantiate their description of petitioner as "paranoid" or as "emotionally upset." The dismissal was reported by the Dean as due to health reasons. Petitioner's appeal brief before respondents and to the Illinois Supreme Court reported the many instances of bad faith by the college and center (some of which are reported below).

The counseling center was described by psychologist Cox as "the official college counseling center that was started by North Park College and subsidized by them." (R. 185) The college catalog reported that the college and its sister institution, Swedish Covenant Hospital, are under the Evangelical Covenant Church and the official name of the Center at the time was the "Covenant Counseling Center." The college and center personnel, Director Esau and Cox claimed that a partnership agreement existed between college and center. However, neither college nor Center personnel produced the alleged agreement or any evidence in support of independence between them. They were not certain as to the years in which the partnership agreement was allegedly in effect. (R. 60, 118, 141, 183) The trial court never ruled that the Center was independent. Its *last* words on the subject are: "What the relationship is between the college and the center has still not been determined at this point, so the objection is overruled." (R. 324) The verdict was found for petitioner—that the college had breached its contract with her since there was no evidence in support of its labelling of her as "paranoid" and expulsion thereupon.

In support of their finding of independence and that the college had acted in good faith, the respondents said: (1) "[T]he . . . center was also funded by Swedish Covenant Hospital. (2) The Illinois Department of Mental Health

also participated in funding the center and (3) required the center to provide services to the surrounding community. (4) The counseling center provided its independent service not only to NP C(ollege) but also to Olivet Nazareth College and Wheaton College. In addition . . . (5) No member of the counseling center staff was in any manner connected with NPC."

Except for reason #1 above, which is reported in the catalog and was undisputed, no proof was shown for any of the above-stated reasons either as to fact or the time in question. Reason #5 is false according to the testimony of an employee of the center student-psychologist Hunt, the deposition testimony of the psychologist, and the Director of the Center was listed in the college catalog as head of a department of the college. The respondents merely accepted the denials of agency by the college, center director and psychologist and their citations of their denials, and remained silent on the evidence relied on by the trial court (as presented in appeal briefs). (R. 158, 217)

All information as to the facts in respondents' opinion is from the brief of the defendant college including that which is undocumented and without proof in the record. The respondents are silent on *all* of the key evidence, testimony and crux of this lawsuit as documented in the appeal briefs, e.g., the psychological testing-interviewing-research program in conjunction with the non-standardized test carried on between college and center; that the college conceded that the testing was done without notice (respondents report "Plaintiff testified she received no information about psychological testing before her fall enrollment) (R. 136); that student psychologist Mr. Hunt testified that he:

> "was just a student and so [Petitioner] and a number of other students came to me for a ten-minute inter-

> view in which if I felt there were issues that arose in the interview, I would recommend to other members of the staff she go on for further experimentation . . . I was not a part of making the diagnosis." (R. 50-51);

that the college through its counseling center sought out students whose names appeared on lists received from the counseling center to the college who were to report to the Center for failing the psychological test; that the medical mal-diagnosis of petitioner by the psychologist was the result of the routine psychological testing of incoming students. (R. 171-172) Where the college gives contradictory undocumented information, respondents pick one to report: students were to go to the center for only an "interpretation" of their test results. Respondents report Mr. Hunt's presumptive notation as fact, misquoting him to describe petitioner as "below average intelligence" again without documentation and in disregard of Exhibit 41 (petitioner's scholastic record, of B average).

Several false, undocumented statements are also reported by respondents without offer of proof or proof in the record, e.g., "[petitioner] was given another personality test;" ". . . the test . . . was graded at the University of Minnesota;" "No member of the counseling center staff was in any manner connected with NPC." Undocumented statements, hearsay (opinion shows) and inference are reported as fact (that the dismissal was for disciplinary reasons; that petitioner was in therapy during the post-expulsion period) all without proof in the record or offer of proof for any disagreement with the trial court.

The college's brief gives descriptions of a hypothetical paranoid person and definition of paranoid. No unsatisfactory act or behavior on petitioner's part is reported by respondents. Respondents substituted the opinion of psy-

chologist Cox for that of the Professor-Doctor Jack Arbit, Department of Psychiatry and Neurology and Director of Psychological Testing at Northwestern Memorial Hospital and two other psychological-psychiatric expert witnesses in finding that the psychological test administered to all incoming students was reliable, and as to petitioner's test results.

After respondents' decision was entered on February 2, 1980, and with her attorney out of the country several months, petitioner submitted her timely pro se petition for remand or hearing on March 10, 1980 (after her request for extension of time was granted) which was denied. Thereafter, on June 5, 1981, petitioner timely filed her petition to the Illinois Supreme Court for leave to appeal through her attorney wherewith a request was made on her behalf to file the above-mentioned Amici Curiae brief, both of which were denied by the court.

On July 13, 1983, (for her legal and financial disability status at the time the respondents' decision was entered) petitioner through her attorney filed again a petition for rehearing before respondents which was again denied. And a follow-up petition again to the Illinois Supreme Court (albeit late) on January 20, 1985, *As A Matter of Constitutional Right* (Rule 317(a)) and the Illinois Supreme Court's supervisory power over the Appellate Court (Rule 315), with her Motion explaining the late petition which was again denied on March 21, 1985.

The Federal Lawsuit

Four years, four and one-half months after the respondents reversed petitioner's case, on June 20, 1985, petitioner brought suit, pro se, in Federal District Court naming the State of Illinois, Judges of the Illinois Appellate

Court, First Division, Mayer Goldberg, Thomas A. McGloon, Calvin C. Campbell, for negligence, misrepresentation, fraud and sham proceedings in the appellate review and reversal of her case on. Petitioner filed her cursory (one-page) complaint on that date by converting her Motion-for-extension of time at the court into a complaint (due to inability to learn the definite limitations period) without paying the filing fee.

Her complaint gave the constitutional grounds of the 14th, 9th (she meant 7th) and 5th Amendments and a short statement of her cause of action.

On December 1, 1985, petitioner submitted a Motion to Federal District Court to file her First Amended Complaint instanter and pay the filing fee. Jurisdiction was based on the 5th, 7th, 14th Amendments of the Constitution and Civil Rights statutes, Title 42 of the U.S.C., Sections 1983, 1982, 1981, 1985 and 1988, and Title 28 U.S.C. Sections 1343(3)(4), 1344 and 2201, 2202 and 1257.*

District Court denied her Motion by Memorandum-Opinion-Order dated December 30, 1985 and the Appeals Court confirmed. The Appeals Court's Opinion begins by restating the information and stigma of petitioner as in the respondents' opinion as if it were proven fact.

Relying on District Court's Order, Appeals Court reports that petitioner's Complaint was "frivolous," complaining only of judicial "error," of not receiving any "rea-

* The allegations of petitioner's proposed amended complaint are deemed to be true and all inferences drawn in her favor because the Seventh Circuit Court of Appeals affirmed the Northern District of Illinois, not on the basis of any judicial discretion in denying leave to amend or make a late payment of the filing fee but rather on the basis of the failure of the proposed amended complaint to state a claim within the jurisdiction of the district court.

sons" for the reversal of her case, and that she did not "take exception" to District Court's Memorandum-Opinion-Order, reporting:

> "[I]t is clear upon closer examination that petitioner is genuinely not concerned with the vindication of recognized constitutional rights but rather with protecting her damage award . . . Appellant does not claim that the 'proceedings were a sham or that the justices invidiously used their office to deprive plaintiff of her rights. As such, she failed to state a claim cognizable in the district court."

In her First Amended Complaint petitioner took "great exception" to district court's order. She reported the same facts as herein stated. That the respondents reported false, unsupported, unsupportable testimony, hearsay, were silent on all of the major evidence relied on by the trial court, explained in a full page why the reasons offered by respondents failed as substitute for the proof both as to fact and as to the time in question in light of the liberty interests of which the State through the respondents denied petitioner and that respondents were guilty of gross negligence and/or intentional misrepresentation of her case. She reported facts representing fraud and sham, notwithstanding the fact that petitioner did not use the words "fraud" and "sham" in her First Amended Complaint (fearing dismissal for their use). She protested under the Constitution, asking protection by Federal Court for, the re-attachment of stigma to her by the State through respondents of a defamatory medical diagnosis without any medical doctor's opinion/report, confirming proof in the record, or *any* bona fide report for the defamation, nor citation of case law or reconciliation of the legal principles with the proofs for the claim of independence (and good faith by the college), and with only a superficial report on contract law. She protested the

removal of her right to the due process of trial, verdict and judgment award—an appellate review outside of the rules of due process and the rules of evidence.

In her appeal briefs, petitioner pleaded the same information, documented her facts, submitted exhibits, excerpts of testimony, cited case law definitions of fraud, pleaded misrepresentation, negligence, fraud and sham proceedings by respondents in the review of her case.

Respondents ruled that bad faith by the college is a necessary element of a breach of a school contract. They then disregarded the trial facts and evidence of bad faith as reported in petitioner's appeal brief (e.g., breach of confidentiality), and the numerous proofs showing a long-standing, close association agency relationship between college and center.

Respondents, as their primary case law, relied on *Eisele v. Ayers*, 63 Ill.App.3d 1039, which adhered to "language-certain" contract terms. However, respondents do not follow *Eisele* in its application of basic contract law and "language-certain" terms. They applied the "good faith" principle and disregarded the fact that the psychological testing and referrals to the center thereupon was undisputed as being without notice, and accepted from *Eisele* the application of the "good faith" principle leaving behind basic contract law without explaining. They also found that the words "counseling is *available* . . ." obligated petitioner to same without explaining. Therefore they did not explain their ruling on the contract law, other than superficially.

Respondents also did not deal with whether a private college can dismiss students for health reasons it suspects after provoking the inquiry by the entrapment of covert psychological testing (on an unreliable test) on the basis

of the general language in the school catalog such as respondents quote in their opinion.

Is there any responsibility on the part of a State Appeals Court to verify a defendant's disclaimers and be accountable by the evidence or grant petitioner's request for a hearing in which to establish the proofs before reversing?

Petitioner sought declaratory judgment and injunction in Federal Court (under *Pulliam v. Allen*, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984)) that the policy of respondents, as State Appellate Judges, of remaining "silent on the fundamental information of law and evidence when reversing a case is unconstitutional" and requested a hearing in which to establish the proofs on the issue of independence (at least).

Petitioner realizes that she may have given far too much detail on the facts. However for the press of time and work, etc., she must submit it as is.

REASONS FOR GRANTING THE WRIT

1. This Writ Should Be Granted Because It Presents An Important Question Of Federal Law Which Should Be Settled By This Court.

Congress enacted 42 U.S.C. § 1983 "to interpose the federal courts between the States and the people, as guardians of the people's federal rights, to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or *judicial.*' " *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (emphasis added). Claim preclusion under § 1738 cancels § 1983 pro-

tection to people from harm by the judicial branch of government.

2. The Writ Should Be Granted To Settle A Conflict Between The Federal Circuit Courts Of Appeals.

There is a conflict between the Federal Circuit Courts of Appeals as to whether § 1738 (full faith and credit in a State court judgment) is always to be employed to protect a State court judgment from a § 1983 claim. The Fifth, Seventh and Tenth Circuit Courts of Appeals are operating differently under these statutes. The Fifth Circuit applies claim preclusion doctrines to bar a § 1983 action. *McWilliams v. McWilliams*, 804 F.2d 1400 (5th Cir. 1986). In a number of recent decisions, the Tenth Circuit refused to give claim preclusive effect to prior State court judgments in § 1983 cases where it was not clearly established that the plaintiff had a full and fair opportunity to litigate his claims, *Thournir v. Meyer*, 803 F.2d 1093 (10th Cir. 1986); *Scroggins v. Kansas, Dept. of Human Resources, Div. of CETA*, 802 F.2d 1289 (10th Cir. 1986), or the Court doubted the quality or fairness of the prior State court procedures, *Morgan v. City of Rawlins*, 792 F.2d 975 (10th Cir. 1986).

The Seventh Circuit has also held that a prior State court judgment is not entitled to claim preclusive effect where the prior state proceedings did not afford the federall plaintiff the requisite due process mandated by the Constitution. *Jones v. City of Alton*, 757 F.2d 878 (7th Cir. 1985); *Boileau v. Bethleham Steel Corp.*, 730 F.2d 929 (3rd Cir.), *cert. denied*, 469 U.S. 871 (1984). In *Jones v. City of Alton*, 757 F.2d 878 (7th Cir. 1985), the Seventh Circuit Court of Appeals appeared to have reached the same result as the Tenth Circuit in *Thournir* and *Scroggins*. However in petitioner's case, the Seventh Circuit

failed to make the application simply because the respondents properly, if not correctly, decided the legal question of whether petitioner had to prove a lack of good faith or independence and failed to accord petitioner due process when they simply assumed without explanation that the evidence she had introduced—which respondents did not address—did not in fact prove or *could not have* proven agency and bad faith to the satisfaction of the trial judge. Respondents further improperly assumed that petitioner could not produce any additional evidence on either point after a remand for further proceedings (as she asked) in accordance with their legal rulings as to the proper requirements for her cause of action.

The Seventh Circuit correctly held that respondents did not act without explanation pursuant to Illinois Supreme Court Rule 23 as to the legal requirements for her breach of contract action. The Seventh Circuit, however, completely failed to see or understand that respondents *did* act without explanation pursuant to Rule 23 as to the facts pertinent to the legal requirements of independence and bad faith.

3. The Writ Should Be Granted Because The Questions Are Of Great Public Interest.

The questions presented are of great public interest—concerning whether the due process of the trial court that a plaintiff (or defendant) is caused—according to court requirements and rules of evidence—to work so laboriously to comply with over so many years can be so easily set aside although one's most basic rights are involved—is a matter of substantial public interest.

CONCLUSION

The Supreme Court is already overburdened and should not be required to deal with the protection of federal rights in state courts on a claim preclusive rather than an issue preclusive basis. When the state court has not addressed the federal issue the assistance of the lower federal courts in the first instance is appropriate. In the case of habeas corpus this has been traditional.

For these reasons a writ of certiorari should be granted to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

LILLIAN ARONSON
9348 Drake Avenue
Evanston, Illinois 60203
(312) 675-7351
Petitioner Pro Se

August 28, 1987

APPENDIX

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted January 21, 1987*

March 31, 1987.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

LILLIAN ARONSON,

Plaintiff-Appellant,

No. 86-1178 v.

STATE OF ILLINOIS, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 85 C 5796
William T. Hart, *Judge.*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument

(Footnote continued on following page)

ORDER

Plaintiff-appellant, proceeding *pro se*, appeals from the denial by the district court of her motions to pay a late filing fee and to file an amended complaint. The district court denied appellant's motions on the basis of its holding that the claims underlying her cause of action were not cognizable in federal court. We agree that the district court was not the proper forum for appellant's suit and, accordingly, affirm the denial of both of appellant's motions.

I.

This suit has its origin in 1967 when appellant was dismissed from college after a psychological examination indicated that she did not possess sufficient mental health to continue her studies. In 1973, appellant filed suit contesting her dismissal in district court but her case was dismissed for want of prosecution—a dismissal affirmed on appeal to this court. Appellant subsequently filed a second suit in federal court alleging a violation of her civil rights and a violation of the oral contract between the parties. The district court dismissed the civil rights claim based upon res judicata and the contract claim was dismissed for lack of federal jurisdiction. Appellant appealed to this court but subsequently dismissed the appeal on her own motion. Finally, in 1975, appellant filed suit in state court on the breach of contract theory and, after a bench trial, was awarded $22,321.60. In *Aronson v. North Park College*, 94 Ill. App. 3d 211, 418 N.E.2d 776

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* *continued*
would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 34(f). Appellant has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

(1st Dist. 1981), however, an Illinois appellate court reversed appellant's award. Appellant's petition for a rehearing of the decision was later denied. Appellant waited nearly four years before seeking leave to appeal to the Illinois Supreme Court but that untimely request was denied in March 1985.

Still earnestly in search of redress, appellant initiated the present suit in the district court in June 1985. Appellant named as defendants the State of Illinois, the judges of the Illinois Appellate Court First District, First Division and, the three judges of the appellate court who ruled on her state appeal. Appellant also sought to proceed *in forma pauperis* but the district court concluded (i) that she possessed significant assets and (ii) that her complaint was so incomplete as to be frivolous—conclusions precluding *in forma pauperis* status. On December 18, 1985, appellant filed the motions presently at issue—to pay her filing fee late and to file an amended complaint—neither of which, as stated earlier, found favor with the district court. This appeal ensued.

III.

Although appellant's amended complaint appears neither in the record nor in appellant's briefs or appendix, the district court opinion contains a synopsis of the rejected complaint to which appellant does not take exception. The proposed complaint alleged violations of the Fifth and Fourteenth Amendment right of due process, the Fourteenth Amendment right to equal protection and the Seventh Amendment right to a jury trial.[1] Appellant also claimed violations of 42 U.S.C. §§ 1981, 1982, 1983 and 1985 but she appears to have abandoned pursuit of such

[1] Both appellant's complaint and the district court opinion refer to an additional Ninth Amendment claim; no such claim, however, is made by appellant and instead on appeal appellant raises a Seventh Amendment argument. We shall assume that appellant confused these two constitutional claims.

violations on appeal. Finally, appellant contends that Illinois Supreme Court Rule 23 violates the due process clause in that it allows appellate court judges to reverse jury verdicts without citing their reasons for so doing.

The district court denied appellant's motions because her underlying claims failed to state cognizable federal claims. Clearly, appellant's complaint cannot be filed in federal court under the court's diversity jurisdiction, 28 U.S.C. § 1332, as there is no diversity of citizenship between appellant and defendants. Thus, appellant's cause of action, if properly before the district court, must present a question under some federal law. See 28 U.S.C. § 1331. While appellant has certainly framed her amended complaint in constitutional terms, it is clear, upon closer examination, that she is genuinely concerned not with the vindication of recognized constitutional rights but rather with protecting her damage award from unfavorable appellate review. In effect, appellant is asking this court to pass upon the reversal of her case by the Illinois Appellate Court—we are without jurisdiction to so act.

Absent allegations that the state court "proceedings were a sham that the justices invidiously used their offices to deprive plaintiff of her rights," a plaintiff cannot resort to the lower federal courts to attack a final judgment of state courts. *See Adkins v. Underwood*, 520 F.2d 890, 893-94 (7th Cir.), *cert. denied*, 423 U.S. 1017 (1975). Under 28 U.S.C. Section 1257 review of the final judgment of a state court may only be had in the Supreme Court. As the Supreme Court recently held:

> [United States district courts] do not have jurisdiction . . . over challenges to state-court decisions in particular cases arising out of judicial proceedings even if these challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court. 28 U.S.C. Section 1257.

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983). Appellant does not claim that the

"proceedings were a sham or that the justices invidiously used their office to deprive plaintiff of her rights." As such, she failed to state a claim cognizable in the district court.

To the extent appellant's complaint could be liberally construed to constitute a challenge to Illinois Supreme Court Rule 23, her claim was also properly dismissed. Although 28 U.S.C. Section 1257 does not bar an attack on "the validity of a rule promulgated in a non-judicial proceeding", *see District of Columbia Court of Appeals v. Feldman*, 460 U.S. at 486, Illinois Supreme Court Rule 23 has no bearing on the issues of this case. Illinois Supreme Court Rule 23 allows the appellate courts in Illinois to dispose of an appeal by entry of an unpublished written order. The Illinois appellate court decision reversing appellant's damage award, however, was a published decision which thoroughly analyzed appellant's case and logically explained the rational for the court's decision. *See Aronson v. North Park College*, 94 Ill. App. 3d 211, 418 N.E.2d 776 (1st Dist. 1981). Because Illinois Supreme Court Rule 23 is irrelevant to any injury appellant may have suffered she lacks the standing necessary to challenge the rule. *See Myron v. Chicoine*, 678 F.2d 727, 730 (7th Cir. 1982).

Accordingly, the district court's decision is in all respects

AFFIRMED.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

94 Ill.App.3d 211

LILLIAN ARONSON, Plaintiff-Appellee and Cross-Appellee, v. NORTH PARK COLLEGE, Defendant-Appellant and Cross-Appellee.

First District (1st Division) Nos. 80-383, 80-1817 cons.

Judgment reversed.

Opinion filed February 2, 1981—
Rehearing denied April 13, 1981.

1. APPEAL AND ERROR (§ 1013)—*issue will be held waived when point is not argued or raised.*

2. FORMER ADJUDICATION (§ 26)—*dismissal of Federal action due to counsel's failure to appear for status report did not bar subsequent action in State court.* Dismissal of original Federal court action because plaintiff's attorney failed to appear in court for status report was not *res judicata* so as to bar subsequent action in State court.

3. COLLEGES AND UNIVERSITIES (§ 5)—*private college was not liable to student for dismissing her based on psychologist's report as to her emotional condition.* Private college, which advised plaintiff-student in writing that plaintiff would not be permitted to continue her studies at such college after expiration of term after receiving memorandum from qualified psychologist that plaintiff suffered chronic paranoid condition which would be serious detriment to plaintiff and others, acted in accordance with and within limitations of written contract between parties and was not liable to plaintiff.

APPEAL from the Circuit Court of Cook County; the Hon. CHARLES E. FREEMAN, Judge, presiding.

Smith & Munson, Ltd., of Chicago (James G. Meyer, of counsel), for appellant.

Wayne B. Giampietro and Gregory N. Freerksen, of Chicago (DeJong, Poltrock & Giampietro, of counsel), for appellee.

Mr. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Lillian Aronson (plaintiff) brought this action against defendant North Park College (NPC), a private school, as a result of her dismissal as a student. After a bench trial, plaintiff was awarded damages of $22,231.60. Defendant appeals and plaintiff seeks an increase in damages by cross-appeal.

Plaintiff originally filed a complaint against defendant and other named persons in the United States District Court for the Northern District of Illinois. That action alleged a violation of plaintiff's civil rights as a result of her dismissal from NPC. The case was dismissed because plaintiff's attorney failed to appear for a status report. The court of appeals affirmed the dismissal.

Plaintiff filed a second suit in Federal District Court again alleging a violation of her civil rights and also a violation of the oral contract between the parties. An order was entered based upon res judicata granting defendant's motion to dismiss "all claims except those relating to the breach of contract claim." Thereafter, an order was entered dismissing the breach of contract claim for lack of federal jurisdiction. Plaintiff appealed to the court of appeals, but subsequently dismissed this appeal on her own motion.

On January 8, 1975, plaintiff filed the instant action in the circuit court. Her amended complaint was also based on plaintiff's dismissal from NPC in 1967. Count I alleged a breach of contract. Count II alleged a violation of plaintiff's constitutional rights. Count III alleged an arbitrary and a negligent violation of her right to privacy. The trial court dismissed Count II on the basis of res judicata and

Count III as being barred by the statute of limitations. The trial proceeded only on the breach of contract claim as alleged in Count 1.

The evidence shows that on January 25, 1966, plaintiff applied to NPC for admission as a student. She was accepted and completed one evening course in the spring and another in the summer of 1966. That fall, she enrolled as a full-time student.

In November 1966, plaintiff received a notice from the dean of students to take the Minnesota Multiphasic Personality Inventory Test (MMPI). This test was developed by the University of Minnesota and consists of 566 objective questions. There is evidence that this test is a well-regarded psychological examination and that all incoming students were required to take it. As a result of their scores, some students were referred to the Covenant Counseling Center (counseling center) for a review of their test score. On the basis of this review, the counseling center would decide if further counseling was necessary. Plaintiff testified she received no information about psychological testing before her fall enrollment.

Plaintiff subsequently took the test which was graded at the University of Minnesota. Pursuant to standard procedure, the counseling center staff reviewed plaintiff's score. Because her results showed a deviation from normal, the center notified NPC. In February 1967, plaintiff received a notice to go to the counseling center for interpretation of her score. She did not appear for her scheduled appointment. The dean of students, Carroll J. Peterson, sent plaintiff a letter requesting her to appear at the center or face dismissal. In a telephone conversation, Dean Peterson told plaintiff she would be obliged to appear at the center several times and this procedure was required of 5 to 10 percent of all NPC students.

On February 21, 1967, plaintiff had a 30 minute interview with William O. Hunt, a student psychologist at the counseling center. During this interview she was given another personality test. Plaintiff returned to the coun-

seling center on March 20, 1967, to fill out a biographical questionnaire. When asked when she would return, plaintiff sought out Mr. Hunt, protested, and departed. Mr. Hunt subsequently prepared a report dated March 28, 1967, describing plaintiff as "frightened and running" or "slightly below average in intelligence" and with symptoms of "blocking" and "denial".

Plaintiff returned to the counseling center on May 9, 1967, for a brief interview with Dr. Richard Cox, a clinical psychologist. On May 11, Dean Peterson received the folowing memorandum from Dr. Cox concerning plaintiff:

> "The above named student was seen as a result of MMPI deviations. Further interviews reveal a pronounced, chronic paranoid condition which will be a serious detriment to herself and others. This is particularly serious inasmuch as she plans to enter the field of education. She is totally unaware of her condition, unwilling to involve herself in treatment and therefore at this time renders herself untreatable. This student does not possess sufficiently strong mental health to continue the pursuits of college or an educational career at this time."

On the basis of this memorandum, Dean Peterson wrote plaintiff a letter informing her of her dismissal from NPC at the end of the term due to her lack of "sufficiently strong mental health."

A meeting of the counseling center staff was held on May 16, 1967. Dr. Truman Esau, the staff psychiatrist, attended. The staff as a whole diagnosed plaintiff as being in a "paranoid state".

Between July 1967 and June 1968 plaintiff had several contacts with Dean Peterson and other NPC officials concerning readmission. She requested the school to contact her then current psychiatric therapist. On June 19, 1968, Dean Peterson refused plaintiff's request for readmission due to her mental status. Subsequently, on July 9, 1968, Dean Peterson received the following memorandum from Dr. Esau:

> "This will confirm that I have had a contact from Dr. Francis Parks who is the therapist of Lillian Aronson. It is my understanding from my conversation that the patient's personality characteristics are unaltered. Any behavioral difficulty that you experienced with her would likely be recurrent."

Plaintiff was granted permission to return to NPC in June 1969, but enrolled in another college.

The parties stipulated as to the testimony of two psychologists and one psychiatrist who would testify the personality test relied upon is not a reliable screening device and the diagnoses of plaintiff were therefore inaccurate. However, all three admitted they had not examined plaintiff in 1967. Two of them conceded that if they had, their opinions might change. Stipulated testimony was also entered from seven of plaintiff's personal and business associates that plaintiff exhibited no signs of mental disorder.

In this court, defendant contends: the trial court should have dismissed the action on the theory of res judicata; the judgment is contrary to law because it involved the dismissal of plaintiff from a private college; and, alternatively, plaintiff is not entitled to an increase in damages.

I.

As shown, Count III of the amended complaint alleged the defendant NPC was guilty of "arbitrary and discriminatory and unlawful conduct" and of "a negligent or wilful invasion of plaintiff's right to privacy * * *." This count was dismissed prior to trial. Count II alleged defendant was guilty of "arbitrary and discriminatory" actions which deprived plaintiff of her right to due process of law. Count II was dismissed by the trial court in the final order appealed from. No point is raised or argued by plaintiff on this dismissal and the issue is therefore waived. Ill. Rev. Stat. 1979, ch. 110A, par. 341(e)(7); *Village of Crainville v. Argonaut Ins. Co.* (1980), 81 Ill. 2d 399, 405, 410 N.E.2d 5.

Count I was therefore the only remaining count. The gist of that count is simply an allegation defendant "breached the written contract" between the parties. This contract consisted of the college catalog, bylaws and other pertinent written regulations.

Defendant contends the trial court erred in refusing to dismiss Count I since plaintiff's cause of action was barred by res judicata. This argument by defendant is predicated on its theory that "dismissal of the original Federal Court lawsuit, 73 C 245, was a judgment 'on the merits.' " If a subsequent action is to be barred by res judicata the initial judgment must be "upon the merits." See *Towns v. Yellow Cab Co.* (1978), 73 Ill. 2d 113, 382 N.E.2d 1217.

Plaintiff's second federal suit was dismissed on the ground of res judicata on the civil rights claim and lack of federal jurisdiction on the breach of contract claim. The decisive issue in this court is the effect of the federal court action on Count I of the instant case.

The original federal action was dismissed because plaintiff's attorney failed to appear in court for a status report. Supreme Court Rule 273, (Ill. Rev. Stat. 1979, ch. 110A, par. 273) provides:

> "Unless the order of dismissal or a statute of this State *otherwise specifies*, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." (Emphasis added.)

However, when plaintiff filed her action in the trial court, section 24 of the Limitations Act, (Ill. Rev. Stat. 1975, ch. 83, par. 24a) provided, in part, that where an "action is dismissed for want of prosecution then, whether or not the time limitation for bringing such action expires during the pendency of such suit, the plaintiff * * * may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such * * * action is dismissed for want of prosecution."

"In *Kutnick v. Grant* (1976), 65 Ill. 2d 177, 357 N.E.2d 480, section 24 of the Limitations Act was determined to be a statute that 'otherwise specifies' within the meaning of Rule 273," (*Bruer v. Livingston County Board of Zoning Appeals* (1978), 66 Ill. App. 3d 938, 940, 383 N.E. 2d 1016.) In *Kutnick*, plaintiff's original action was also dismissed for want of prosecution when his attorney failed to appear at a regular call of cases. Defendant contended the dismissal of the original action for want of prosecution "operated as an adjudication of the plaintiff's case on the merits under our Rule 273 * * * and thus barred the filing of plaintiff's second complaint." 65 Ill. 2d 177, 180.

The supreme court dismissed defendant's argument stating (65 Ill. 2d 177, 180-81):

> "The defendant argues that the portion of section 24 of the Limitations Act quoted above is not a statute that 'otherwise specifies' within the meaning of Rule 273. The argument is hardly convincing. If one interprets Rule 273 as the defendant would have us do, that part of section 24 which is involved here would be meaningless. If the defendant's reading of the section were to be adopted, every suit dismissed for want of prosecution and reinstated or filed again pursuant to section 24 would be vulnerable to dismissal under Rule 273. It cannot be reasonably contended that this was the intent of the legislature in enacting section 24. Section 24 plainly states that if a suit is dismissed for want of prosecution a new action may be filed within one year of the dismissal. * * *."

Thus, we conclude res judicata is not applicable to bar Count II.

II.

The record shows, and it is conceded, there was a written contract between these parties. Plaintiff's brief sets out the pertinent documents which constitute the contract.

On January 25, 1966, plaintiff signed and tendered a written application for admission to NPC. Various blanks in this form have been filled in by typewriter and in plaintiff's handwriting. Plaintiff signed this application. Immediately above plaintiff's signature the following printed language appears:

> "If my application for admission is accepted, I agree to abide by all regulations of the institution and to respect its traditions. I certify that to the best of my knowledge the statements made in this application are correct and complete."

The college catalog issued by NPC for 1964 to 1966 contains the following provisions:

> "The Counseling Center, 3417 West Foster, is jointly sponsored by North Park and Swedish Covenant Hospital. Its staff consists of a psychiatrist, a clinical psychologist, a psychiatric social worker and an intake counselor. The Center is equipped to handle a variety of psychological problems.
>
> "This service is available to any student upon his request or by referral. Appointments may be made by consulting the intake counselor in the Center. The initial evaluation is without charge. There is a charge for treatment. Students may be assured of the confidentiality of these interviews."

Another portion of this college catalog provides:

> "The institution reserves the right to dismiss at any time a student who in its judgment is undesirable and whose continuation in the school is detrimental to himself or his fellow students. Such dismissal may be made without specific charge. Students who have been suspended or expelled will receive no refund of moneys paid to the school."

It is plaintiff's theory that liability arises because the evidence shows NPC has acted in an arbitrary and capricious manner. Plaintiff urges NPC breached its written assurance of confidentiality, required plaintiff to report

for psychiatric counseling and terminated the status of plaintiff as a student. Plaintiff urges that whether the conduct of defendant as shown by the record was arbitrary and capricious is an issue of fact. Defendant contends the judgment of the trial court is contrary to law and courts have no authority to review dismissal of a student from a private college.

The single Illinois decision relied upon by plaintiff is *DeMarco v. University of Health Sciences Chicago Medical School* (1976), 40 Ill. App. 3d 474, 352 N.E.2d 356. There, in plaintiff's application for admission to the private school, he answered "no" to the question, "Have you attended another medical school?" Plaintiff completed all but the last six weeks of his final year. The school ascertained plaintiff had, in fact, previously attended another medical school. After discussion, plaintiff and the school agreed plaintiff would enter the armed forces and would be readmitted if honorably discharged. Plaintiff complied with these conditions, but later the school refused to re-admit plaintiff unless he made a pledge for a contribution to the school. The majority of this court held plaintiff was entitled to receive his academic degree.

It is manifest that the facts in *DeMarco* differ sharply from the instant case. In *DeMarco*, there was no contractual obligation upon the student to make any contribution to the school. On the contrary, in the instant case the reason for the separation of plaintiff is clearly stated in and justified by the contract between the parties. The abstract principle for which *DeMarco* stands (40 Ill. App. 3d 474, 480), was quoted by the supreme court in a class suit, *Steinberg v. Chicago Medical School* (1977), 69 Ill. 2d 320, 332, 371 N.E.2d 634, as follows:

> " 'A contract between a private institution and a student confers duties upon both parties which cannot be arbitrarily disregarded and may be judicially enforced. [Citations.]' "

We find the same principle well stated in *Eisele v. Ayers* (1978), 63 Ill. App. 3d 1039, 381 N.E.2d 21. There,

a class action was brought by students to enjoin a proposed tuition increase. This court affirmed an order dismissing the case on the theory that a tuition increase did not violate the contract between the students and the school which was based upon the catalogs issued by the school. The court held (63 Ill. App. 3d 1039, 1044):

> "The catalogues which formed the basis of the contract between the parties reserved to defendants the right to increase tuition. Nothing in the complaint indicates that defendants have exercised this right maliciously or in bad faith. In the absence of such allegations, defendants may not be coerced in the lawful exercise of their discretion."

In support of this position, the court cited *People ex rel. Tinkoff v. Northwestern University* (1947), 333 Ill. App. 224, 77 N.E.2d 345; *Manson v. Culver Military Academy* (1908), 141 Ill. App. 250; and also *Basch v. George Washington University* (D.C. 1977), 370 A.2d 1364, dealing with a tuition increase and reaching the same result.

In the present case, precisely as in *Eisele*, Count I contains no allegation of bad faith or malicious conduct by NPC. There is no allegation of arbitrary and capricious conduct. Count I simply alleges NPC "breached the written contract."

Applying the teaching of *Eisele* to the case before us, NPC, as a private college, had complete right to enforce reasonable regulations for the proper conduct of the school. By signing the application for admission, plaintiff agreed to abide by all regulations of NPC. The catalog clearly provided for counseling upon request "or by referral." The defendant specifically reserved the right to dismiss at any time any student who in defendant's judgment was "undesirable and whose continuation in the school is detrimental to himself or his fellow students." The provision is clear that, "Such dismissal may be made without specific charges." In our opinion, this record presents no evidence of arbitrary, capricious, mailcious or improper conduct by NPC.

The sole issue here is whether defendant acted in accordance with and within the limitations of the written contract between the parties. The evidence shows a memorandum was sent to NPC by Dr. Richard H. Cox, a fully qualified psychologist. NPC was informed thereby that plaintiff suffered from a "chronic paranoid condition which will be a serious detriment to herself and others." It must be remembered Dr. Cox was not an official of defendant but was associated with the independent counseling center. It was only after receiving this information that defendant advised plaintiff in writing she would not be permitted to continue her studies at defendant school after expiration of the term. In addition, defendant received a later memorandum from Dr. Truman G. Esau, also associated with the North Park Clinic. He advised plaintiff's personality characteristics were unaltered and behavioral difficulty with plaintiff "would likely be recurrent."

Furthermore, this record shows no reason for NPC or its staff to have any doubts or misgivings concerning the accuracy of the information regarding plaintiff's condition as presented by the counseling center. We expressly reject the contention of plaintiff that there was an agency relation between NPC and the counseling center. It is correct that the center is housed in a building owned by NPC. Although NPC did provide some portion of the funds for the counseling center, the record shows the center was also funded by Swedish Covenant Hospital. The Illinois Department of Mental Health also participated in funding the center and required the center to provide services to the surrounding community. The counseling center provided its independent services not only to NPC but also to Wheaton College and Olivet Nazareth College. In addition, there was no overlapping of personnel between NPC and the counseling center. No member of the counseling center staff was in any manner connected with NPC.

Thus, we find here a complete lack of any evidence of bad faith, malicious conduct or arbitrary and capricious

action by NPC. In view of the information presented to the college authorities as above shown, it was incumbent upon them as part of their duties to effect a separation of plaintiff from the college. In the trial court, this case proceeded upon the theory that the dispositive issue was the truth or falsity of the information given to NPC by the counseling center. Plaintiff's able counsel on appeal did not participate in the trial court. Plaintiff produced evidence from her friends and other persons as above shown regarding the alleged actuality of plaintiff's mental condition. However, the matter should properly have been presented upon the issue above discussed as to whether NPC acted with propriety and within the terms of the contract between the parties by accepting the diagnostic opinion which emanated from the counseling center.

We accordingly conclude defendant NPC is without liability in this situation.

In view of the above, it is unnecessary for us to consider plaintiff's cross-appeal asking an increase in the amount of damages allowed by the trial court.

For these reasons the judgment appealed from is reversed.

Judgment reversed.

McGLOON and CAMPBELL, JJ., concur.